IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.1969 OF 2007

1) Shamim Bano G.Rathi

2) Saba Khan

Both of Mumbai, indian
Inhabitants, residing at
Plot No.22, Greater Bombay
Co-op.Hsg.Soc. Limited,
Samarth Ramdas Marg,
JVPD Scheme, Mumbai-400 049 ..Petitioners

Versus

1) Oriental Bank of Commerce Ltd.,
a body corporate incorporated
under the Banking Companies
(Acquisition & Transfer of
Undertaking) Act, and having
its branch Office at Bombay
Samachar Marg, Fort,
Mumbai-400 023.

2) The Assistant Commissioner of
Income Tax, Range 20(3),
having his office at Piramal
Chambers, 506, Fifth Floor,
Jijibhai Lane, Lalbaug, Parel,
Mumbai-400 012.

3) Income Tax Officer,
Ward 18(1) (4)
having office at Piramal
Chambers, First Floor,
Jijibhai Lane, Lalbaug, Parel,
Mumbai-400 012.

3A) Dy.Commissioner
of Income Tax, Circle 2(3),
Aaykar Bhavan, M.K.Road,
Mumbai-400 220.

4) Union of India
through the office of the
Government Pleader, High Court,
Bombay.

5) Sashak Noble Metals Ltd.,
a company incorporated under
the Companies Act, 1956 and
having its office at 6th floor,
Rahimtoolah House, 7, Homji

Street, Fort, Mumbai-400 001 ..Respondents

Mr.Gaurav Joshi with Mr.Jitendra Jain & Rajesh Rathod i/by Bilawala & Co. for the petitioners.

Mr.G.Kulkarni with Mr.Satish Bejai i/by Bejai & Co. for respondent no.1.

Mr.R.Ashokan with Mr.P.S.Sahadevan for respondent nos.2 to 4.

Ms.Pradnya T. Acharya for respondent no.5.

Coram : F.I.Rebello &
R.S.Mohite,JJ

Date : 5.12.2007.

Oral Judgment :- (Per : F.I.Rebello,J)

1. Rule. Heard forthwith.

2. It is the case of the petitioners that by a registered deed of sale dated 30.7.2002 they purchased the premises from respondent no.5. Admittedly, there were proceedings pending under the Income Tax Act against respondent no.5 on that date. The order of attachment under Section 226(3) of the Income Tax Act made on 19.6.2002 was lifted sometime in July-2002. Admittedly, on the date of the sale of the property there was no order of attachment. The order of attachment was subsequently passed on 22.10.2003.

3. Respondent no.5 had taken a loan from respondent

no.1 and to secure the loan had created a mortgage in favour of respondent no.1. Respondent no.5 has also created leave and license in favour of respondent no.1. The license amounts were to be adjusted against the loan amount advanced by respondent no.1 to respondent no.5.

. Though the petitioners had served the notice of attornment on respondent no.5 and though the petitioners were showing the income received from respondent no.1 in their returns, respondent no.1 continued to issue TDS certificate in favour of respondent no.5. According to the respondent no.1 this was done considering the order passed by respondent no.3 under Section 226(3) of the Income Tax Act. Counsel for respondent no.1 however, states that they have no objection in issuing the TDS certificate in favour of the petitioners and accordingly to carry out rectification in the TDS certificate in favour of the petitioners. By October-2007 the loan amount payable by respondent no.5 in favour of respondent no.1 has been re-paid. The sale consideration in so far as sale deed between respondent no.1 and respondent no.5 apart from the consideration was also the liability under the mortgage. In other words, though the petitioners had become the owners of the property, the license fee received from respondent no.1 was to be adjusted against the loan dues of respondent

no.5.

4. The petition as earlier filed in this Court was only in the matter of issuance of TDS certificate in the name of the petitioner. In the reply filed by respondent no.1 reference was made to letter dated 4.11.2004 by Tax Recovery officer Range 2(3) to Respondent no.1 wherein it was recorded that the sale of the property by agreement dated 30.7.2002 by respondent no.5 was declared to be null and void by the department by order dated 21.9.2004. Chamber summons was taken out for amendment of the petition and the petition was amended to include amongst other reliefs not to give effect to the orders dated 21.9.2004 and 18.11.2003.

5. The first question that we are called upon to consider is whether it was open for the assessing officer to declare the sale deed between respondent no.5 and the petitioners as null and void, considering section 281 of the Income Tax Act. In our opinion, the issue is no longer resintegra having been answered in the judgment of the Supreme Court in **Tax Recovery Officer v.Gangadhar Viswanath Ranade (Decd.)** reported in 234 ITR 188 where the Supreme Court held that if the department finds that a property of the assessee is transferred by him to

a third party with the intention to defraud the Revenue, it will have to file a suit under rule 11(6) to have the transfer declared void under section 281.

6. On behalf of Revenue, learned Counsel submits that there is distinction between the ratio of that judgment and the facts in issue in the present case as in the instant case it is the assessing officer who has declared the transfer to be null and void whereas in the case of Gangadhar V.Ranade (decd.) (supra) it was the tax officer who had done so. The judgment in Gangadhar V.Ranade (deceased) had come up for consideration before us in **Ms.Ruchi Mehta & Ors. v. Union of India & Ors.** reported in [2007] 294 ITR 614 (Bom). On considering the said judgment, we have taken a view that section 281 of the Income Tax Act 1961 does not prescribe any adjudicatory machinery for deciding any question which may arise under it. In order to declare a transfer fraudulant under Section 281, appropriate proceedings have to be taken before the competent civil Court. The issue therefore, where the order was passed by the Tax recovery officer or A.O. is immaterial.

7. Learned Counsel for assessee further contends that they were bonafide purchasers and the sale cannot be said to be null and void. It is also

contended that no opportunity was given to them before the said order was passed and considering the judgment of this Court (Ms.Ruchi Mehta & Ors.) (supra) the order must be set aside on that ground also. We need not answer these questions at this stage in view of the order to be passed.

. In so far as first contention, we are of the opinion that the order declaring the sale deed dated 30.7.2002 as null and void was an order without jurisdiction and consequently has to be set aside. The petitioners in the absence of any declaration continue to be the owners of the property, till such times a competent civil Court passes any appropriate order.

8. Let us come to next issue of the TDS certificate not being issued in the name of the petitioners. The learned Counsel points out that infact, the assessing officer had himself addressed a letter that the TDS certificate should be issued in favour of the petitioners by respondent no.1. The assessing officer accepted the return filed in the matter of rent but did not grant the benefit in the absence of TDS certificate. Thereafter a demand was made on the petitioners consequence to TDS certificate not being produced. Though the petitioners were owners of the property and were entitled for rent from respondent no.1, respondent

no.1 on account of the service of notice by respondent nos.2 to 3 continued to issue the TDS certificate in favour of respondent no.5.

9. In our opinion, considering that the petitioners' contention to be the owners of the property and the rent was payable by respondent no.1 to the petitioners, the TDS certificate has to be issued in favour of the petitioners as we have held that the order declaring the sale to be null and void is itself illegal and without authority of law. In other words, after the purchase of the property by the petitioners on 30.7.2002 respondent no.1 was bound to issue TDS certificate in favour of the petitioners. The respondent no.1 is therefore, directed to rectify the TDS certificate issued by respondent no.1 in favour of respondent no.5 and issue it in favour of the petitioners.

10. Considering this position, in our opinion, the demand made by respondent nos.2 to 3 on the petitioners would be without jurisdiction. It will however, be open for the petitioners to place this material before the competent officer and the competent officer will take such steps in law including withdrawal of the demand considering that the demand was made, as the TDS certificate was not produced by the petitioners. Hence, following order :-

O R D E R

1. The sale deed dated 30.7.2002 in the absence of a declaration by a civil court that it is null and void and as observed by the Supreme Court in Tax Recovery Officer v. Gangadhar Viswanath Ranade (Decd.) is legal and valid ;

2. As the sale is legal and valid, respondent no.1 was bound to issue the TDS certificate in favour of the petitioners from 30.7.2002 onwards and thereafter. The respondent no.1 is therefore, directed to rectify the TDS certificate and accordingly, issue the same in the name of the petitioners herein ;

3. Consequently the order of attachment dated 18.11.2003 is quashed and set aside and as a consequence the A.O. is directed not to proceed on the basis of the demand notices dated 29.3.2006 and 27.11.2006. It will be open for the petitioners-assessees, based on the rectified TDS certificate to move the A.O. for re-call of the said demand notices ;

4. For a period of six months from today the petitioners will not transfer, alienate or create any third party rights in respect of the suit

property to enable the department to move the civil Court and to take the appropriate orders therefrom.

5. Rule made absolute in the above terms.

(R.S.Mohite,J) **(F.I.Rebello,J)**